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The Legal Regime of the Arctic Ocean

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Many readers will have taken note of recent reports on the legal status of the Arctic Ocean in several international papers. For example, on 13 August 2007 the "Financial Times Deutschland" headlined, in a modification of a famous environmental slogan of the late 1970's, "Save the North Pole!",[1] and the "Frankfurter Allgemeine Zeitung" had already asked on 3 August 2007 "Whose is the North Pole?"[2] While the "Time Magazine" declared a "Fight for the Top of the World",[3] the "Times" predicted the beginning of a new mineral war.[4] Some readers will also have followed the television coverage of two Russian mini-submarines reaching the sea-bed more than 4,000 m beneath the North Pole on 1 August 2007 and planting a one meter-high titanium Russian flag therein in an attempt to bolster the country's claim on the natural resources of the sea-bed and within the subsoil of the respective area. The Russian newspaper "Komsomolskaya Pravda" celebrated the successful and record-breaking dive by printing a large map of the North Pole showing the alleged "addition" to the Russia territory – the size of France, Ger-

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[1] A. Theyssen, Rettet den Nordpol!, FTD of 12 August 2007.

[2] H. Rademacher, Flagge auf dem Meeresgrund: Wem gehört der Nordpol? Russland schickt U-Boote und sagt: Uns, FAZ of 3 August 2007.

[3] J. Graff, Fight for the Top of the World, Time Magazine of 19 September 2007.

[4] T. Halpin, Mineral War Begins as Russians Plant Flag 2½ Miles Beneath Pole, LT of 3 August 2007.

many and Italy combined – under a white, blue and red Russian flag. Irrespective of its obvious symbolic content, supplemented by the somewhat bizarre fact that footage released by the news agency Reuters allegedly showing Russian submersibles on the sea-bed of the North Pole was taken from the Hollywood blockbuster "Titanic", the expedition has met with strong reactions, especially from other Arctic States. In this respect, Canadian Foreign Minister Peter MacKay stated in a television interview: "This isn't the 15th century. You can't go around the world and just plant flags and say 'We're claiming this territory'".[5]

In addition to the Russian claim, a dispute has arisen between Canada and the U.S. over the question of free passage through the North West Passage, a direct shipping route from Europe to Asia via the Arctic Ocean. Canadian Prime Minister Stephen Harper ended a – again widely media-featured – three-day-trip to the northern territories by not only announcing the construction of a new deep water port, but also a reinforcement of the military presence in the Canadian community Resolute Bay from 900 to 5,000 Canadian Rangers. Both the quest for the Arctic resources and the issue of passage through the North West Passage have prompted some newspaper commentators to speculate over rising fears of an "ice cold war"[6] – fears which have been addressed by the Arctic States in the Ilulissat Declaration of 28 May 2008, in which they emphasized their commitment to the law of the sea and an orderly settlement of any possible overlapping claims.[7]

But what is the legal meaning, if any, of the Russian course of action? Is Russia, not to forget Canada, Denmark, Norway, and the U.S. who have initiated similar expeditions to the Arctic Ocean recently, legally entitled to claim sovereign rights over the resources of the Arctic sea-bed and subsoil, and in case of affirmation, what are the spatial and factual limits of such rights? Is there a Canadian right to control passage of foreign ships through the straits of the North West Passage? And are the riparian States of the North Pole obliged to cooperate with each other on environmental matters? It is these questions which shall be dealt with in the following. In doing so, the analysis will consider a unified approach to harmonizing the distinct legal aspects of economically relevant uses of the sea with the need to ensure the protection of the Arctic environment.

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[5] Available at: <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20070802/arctic_claim_070802/20070802?hub=TopStories>.

[6] See, e.g., S. Borgerson, An Ice Cold War, NYT of 8 August 2007.

[7] See I. Winkelmann, Feste Spielregeln für die Aufteilung des Arktischen Ozeans, 53 SWP-Aktuell (2008). The Declaration is available at: <http://www.um.dk/NR/rdonlyres/BE00B850-D278-4489-A6BE-6AE230415546/0/ArcticOceanConference.pdf>. – Note that newspaper reports whereby the U.S. have at last accepted the relevance of UNCLOS with regard to marine delineation and delimitation in the Arctic by explicitly stating so in the Ilulissat Declaration (see, e.g., G. Herrmann, Schatzsuche im Eismeer, Süddeutsche Zeitung of 30 May 2008), are not correct. The Declaration refers to the "law of the sea" in general, not to the Convention in particular.

I. Factual Background

According to estimations of the United States Geological Survey, about 25 % of the world's undiscovered oil and gas resources, accompanied by rich diamond and non-ferrous metal deposits, lie hidden under certain areas of the Arctic Ocean.[8] Such figures which are not undisputed within the community of geologists, call for the attention especially of the industrialized countries in an epoch of growing energy hunger and dependency. As a member of the United States Geological Survey has recently put it: "Compared to Northern Iraq, the Arctic is a pleasant working environment."[9] But why do the resources of the Arctic Ocean so strongly come to the fore these days? From a factual viewpoint, the answer is twofold: First, new drilling technologies make it easier to penetrate into previously inaccessible maritime areas, and secondly, excavation of the natural resources of the Arctic Ocean could soon become financially viable due to the thawing of the Arctic ice.

The scientific causes of this process cannot be addressed here in detail. Suffice it to say that in September 2007, an Arctic melting season came to an end during which the expansion of the Arctic ice layer decreased to a total of 4,3 millions of square kilometers.[10] Whereas this figure still sounds impressive, the gravity of the situation becomes obvious when pointing to the fact that today's Arctic ice covers 1,4 millions of square kilometers less than in 2006 – and about half as much as in the 1950's.[11] As dramatic as this development is from an ecological angle – from an economic perspective, the thawing of the Arctic ice allows for accessing and, ultimately, exploiting sea areas which were not profitable to be claimed before.

Similarly, the North West Passage has been free of ice during the summer of 2007 for the very first time since satellite records began in 1978. A permanently or at least seasonally ice free passage would open a new shipping route from Asia to the eastern coast of Canada and the U.S. more than 7,000 km shorter than today's route through the Panama channel.[12] It could be used by mega oil and gas tankers and container vessels for which the Panama Channel is too small.[13] Thus, according to estimations, the total volume of freight traffic will increase from today's three millions of tons to approximately 14 millions of tons in the year 2015.[14] Against

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[8] Cf. T.R. Klett et al., Assessment of Undiscovered Petroleum Resources of the Laptev Sea Shelf Province, Russian Federation: U.S. Geological Survey Fact Sheet 2007-3096, available at: <http://pubs.usgs.gov/fs/2007/3096/pdf/FS07-3096_508.pdf>; C. Krauss et al., As Polar Ice Turns to Water, Dreams of Treasure Abound, NYT of 10 October 2005.

[9] Cf. S. Schlindwein/G. Traufetter, Race for the North Pole: Nations Vying for Arctic Treasures, Spiegel online of 21 August 2007, available at: <http://www.spiegel.de/international/world/0,1518,501034-2,00.html>.

[10] Cf. D. Notz, Arktis und Antarktis im Klimawandel, 47 APuZ (2007), 27-32, at 27.

[11] See ACIA (ed.), Impacts of a Warming Arctic: Arctic Climate Impact Assessment, 2004, 13.

[12] M. Byers, Internationales Recht und internationale Politik in der Nordwestpassage: Konsequenzen des Klimawandels, 67 ZaöRV (2007), 145-57, at 147; see also ACIA, *supra* note 11, 83.

[13] Byers, *supra* note 12, at 147.

[14] Cf. I. Winkelmann, Wem gehört die Arktis?, 56 SWP-Aktuell (2007), 4.

this background, allegations according to which politicians lamenting the loss of the Arctic ice is based on shedding crocodile tears rather than sincere concern for the Arctic environment, do not seem to be completely unreasonable.

II. The Legal Regime of the Arctic

1. Is There a General Legal Regime of the Arctic?

Turning then to the legal aspects of the subject, it is emphasized from the outset that contrary to Antarctica ("Antarctic System"), the Arctic Ocean is not subject to a comprehensive treaty regime. An "Arctic Treaty" modeled on the Antarctic Treaty of 1959[15] does not exist. One of the reasons for the differences as to the applicable legal rules is to be seen in the fact that contrary to the earth's northern sea areas (where the law of the sea applies irrespective of whether they are covered with ice or not),[16] Antarctica constitutes a *terra firma*. While in the south, seven States, the so-called claimants, still rely on a highly controversial sector theory under which each of them exercises territorial sovereignty over a triangular area reaching from south of the southern 60th parallel to the South Pole,[17] no State claims the North Pole as belonging to its State territory today.[18]

In particular, viewed from the legal perspective, planting a country's flag on the bottom of the sea could, if at all, only be regarded as expression of attempted occupation if the respective sea-bed area were to be considered a *terra nullius* not covered by public international law to date.[19] However, the United Nations Con-

[15] 402 U.N.T.S. 71.

[16] Cf. C.C. Joyner, The Status of Ice in International Law, in: A.G. Oude Elferink (ed.), The Law of the Sea and Polar Maritime Delimitation and Jurisdiction, 2001, 23-48; K. Hakapää, Some Observations on the Arctic Waters and the New Law of the Sea, in: T. Utriainen (ed.), Legal Problems in the Arctic Regions, 1990, 67-77, at 68; D. König/T. Neumann, Streit um die Arktis, 56/1 VN (2008), 20-4, at 24.

[17] See, e.g., Australian Antarctic Territory Acceptance Act 1933 ("An Act to Provide for the Acceptance of Certain Territory in the Antarctic Seas as a Territory under the Authority of the Commonwealth"), Section 2, available at: <http://www.austlii.edu.au/au/legis/cth/consol_act/aataa1933407/>. All relevant claims are reproduced in: International Law Documents (1948-9), 217-45. Cf. also J.R. Rowland, The Treaty Regime and the Politics of the Consultative Parties, in: C.C. Joyner/S.K. Chopra (eds.), The Antarctic Legal Regime, 1988, 11-31; R. Wolfrum, Die Internationalisierung staatsfreier Räume, 1984, 49-50. – The Antarctic Treaty leaves the question whether the exercise of territorial sovereignty over parts of Antarctica is legally admissible or not open, cf. Art. IV.

[18] It should be noted that both Canada and the Soviet Union seemed to have invoked some kind of sector theory in respect of parts of their Arctic territories in the past (the extent and legal basis of which were never entirely clear), but these claims met with heavy protest from other States and were later abandoned. See R.S. Reid, The Canadian Claim to Sovereignty Over the Waters of the Arctic, 12 CYIL (1974), 111-36, at 114-5; L. Timtchenko, The Russian Arctic Sectoral Concept: Past and Present, 50 Arctic (1997), 29-35; D. Pharand, Canada's Arctic Waters in International Law, 1988, 1-87; Byers, *supra* note 12, at 149.

[19] See I. Brownlie, Principles of Public International Law, 6th ed., 2003, 133. – It should be noted that occupation is by definition linked to the concept of territorial sovereignty.

vention on the Law of the Sea (UNCLOS)[20] as well as customary international law expressly permit a coastal State to extent its marine territory ("aquitory") only up to twelve nautical miles measured from the baselines which separate the internal waters from the territorial sea.[21] The sea-bed of the Arctic area in question is, thus, either subject to the exercise of sovereign rights by one or more coastal States under the doctrine of the continental shelf, or constitutes an area beyond the limits of national jurisdiction over which no State may exercise sovereignty.[22] Under no circumstances may it be considered as occupiable no man's land. As regards the North West Passage, it is worth mentioning in this context that even when Captain Bernier, who led a Canadian expedition to the northern Arctic territories formerly possessed by Great Britain, erected a plaque on the island of Melville on 1 July 1909 stating that "[t]his Memorial is erected today to commemorate the taking possession for the Dominion of Canada of the whole Arctic Archipelago lying to the north of America from longitude 60°W. to 141°W. up to latitude 90°N.",[23] he later clarified in his account on the expedition that he referred to "all British *territory* in the northern waters".[24]

The fundamental difference as to the applicable legal regimes between Antarctica on the one hand and the Arctic Ocean on the other renders suggestions on an internationalization of the North Pole[25] questionable from the outset. It is also clear that due to the lack of territorial sovereignty of any State over the central part of the Arctic Ocean, the question "Whom does the North Pole 'belong' to?" may simply be answered with a mere "nobody". This, of course, has not made the Arctic States refrain from claiming maritime zones in the high north. However, as will be shown in the following, apart from the drawing of baselines for purposes of delineating the territorial sea, the legal basis for such claims is to be seen in title to exclusive economic usage rather than in title to territory. The only possible exception to this general rule seems to be the North West Passage which shall, thus, be dealt with first.

2. Status of and Passage through the North West Passage

The legal status of the North West Passage has been a controversial issue since the advent of modern times.[26] Whereas Canada has ever taken the position that

[20] United Nations Convention on the Law of the Sea of 10 December 1982, 1833 U.N.T.S. 3.

[21] See Arts. 2, 3 UNCLOS.

[22] See Arts. 77 (1), 137 (1) UNCLOS.

[23] Cited in Reid, *supra* note 18, at 113-4; Byers, *supra* note 12, at 149.

[24] J.E. Bernier, Master Mariner and Arctic Explorer, 1939, 344 (italics added).

[25] See, e.g., the comment by Theyssen, *supra* note 1. The position of the present authors is supported by J.B. Bellinger, Treaty on Ice, NYT of 23 June 2008.

[26] Cf. Byers, *supra* note 12, at 148-9; D.L. Vanderzwaag/C. Lamson, Ocean Development and Management in the Arctic: Issues in American and Canadian Relations, 39 Arctic (1986), 327-37; J.

those parts of the Passage belonging to the "Arctic Archipelago" are subject to its territorial sovereignty and, thus, form part of its State territory, the U.S. consider the relevant sector of the North West Passage as a strait used for international navigation. Indeed, should the latter position be in conformity with public international law, Canada would be barred to hamper passage of foreign ships by requesting prior authorization.

The dispute became manifest in 1985 when Canada was notified of the pending passage of the U.S. coast guard icebreaker "Polar Sea". Canada informed the U.S. that it considered the waters of its Arctic Archipelago as belonging to its internal waters and, thus, asked for authorization for passage. This request was refused by the U.S. In the end, the dispute was settled by agreeing that the crossing of the Passage could take place without prejudice to the differing legal positions. In an Agreement of Arctic Cooperation of 11 January 1988, it was stated in § 1 that

> "[t]he Government of the United States pledges that all navigation by U.S. icebreakers within waters claimed by Canada to be internal will be undertaken with the consent of the Government of Canada".[27]

In § 4, the parties confirmed that the differing views on the legal status of the North West Passage were upheld regardless of the conclusion of the agreement:

> "Nothing in this agreement of cooperative endeavour between Arctic neighbours and friends nor any practice thereunder affects the respective positions of the Governments of the United States and of Canada on the Law of the Sea in this or other maritime areas or their respective positions regarding third parties."

Under general international law, Canada may theoretically invoke three different legal bases for its claim: First, it may take the position that the respective sectors of the North West Passage constitute Canadian territory under the concept of historic waters. Secondly, in 1985 Canada established a system of straight baselines along the perimeter of its Arctic Archipelago. If it was entitled to do so, all waters landwards the straight baselines were to be considered internal waters in which a right of third States to free passage does – generally – not exist. Thirdly, even if freedom of passage would generally seem to be permitted, the question remains whether the preconditions for such freedom were actually fulfilled under the special circumstances of the North West Passage.

a. The North West Passage as Historic Waters of Canada

When addressing the first possible line of argument, reference to the decision of the International Court of Justice (ICJ) in the *Anglo-Norwegian Fisheries Case* is mandatory due to the fact that UNCLOS refers to historic rights only in three provisions and in a rather indirect manner (see Art. 10 [6], Art. 15, and Art. 198 [1]

Kraska, The Law of the Sea Convention and the Northwest Passage, 22 IJMCL (2007), 257-82, at 258-9; M. Voelckel, Les routes maritimes de l'Arctique, 11 ADM (2006), 159-93.

[27] Agreement between the Government of Canada and the Government of the United States of America on Arctic Cooperation, 1852 U.N.T.S. 60 (No. 31529).

[a] [i]). In its judgment, the Court, by building on the doctrine of historic bays which emerged in the course of the 19th century, defined the concept of historic waters as follows:

> "By 'historic waters' are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of a historic title."[28]

Albeit a slightly differing phrasing in the *Case concerning the Continental Shelf*,[29] the statement cited in combination with affirmative legal writings justifies the conclusion that once a historic title has been established over certain water areas, strong evidence exists that these areas are to be qualified as internal waters over which the coastal State exercises complete sovereignty and, thus, may exclude navigation by ships flying foreign flags.[30] Concerning its dogmatic basis, the concept of historic rights may, arguably, be classified as a unique example of unilateral customary law.[31]

The preconditions for the existence of historic waters have most clearly been put to terms by Leo J. Bouchez stating that

> "[h]istoric waters are waters over which the coastal State, contrary to the generally applicable rules of international law, clearly, effectively, continuously, and over a substantial period of time, exercises sovereign rights with the acquiescence of the community of States".[32]

Whether or not these preconditions are fulfilled in respect of the maritime area at hand does not need to be discussed here in detail.[33] Whereas the element of exclusive exercise of jurisdiction might, arguably, be deduced from the undisputed Canadian sovereignty over the islands of the Arctic Archipelago in accordance

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[28] *Fisheries* (*United Kingdom v. Norway*), (1951) I.C.J. Reports 116, at 130.

[29] *Continental Shelf* (*Tunisia v. Libyan Arab Jamahiriya*), (1982) I.C.J. Reports 18, at 73-4 (§ 100).

[30] Y.Z. Blum, Historic Titles in International Law, 1965, 296-7; cf. also B.B. Jia, The Regime of Straits in International Law, 1998, 73-4. But see UN Doc. A/CN.4/143 of 9 March 1962, Juridical Regime of Historic Waters, Including Historic Bays, reprinted in: (1962) YBILC II, 1-26, at 23: "The sovereignty exercised can be either sovereignty as over internal waters or sovereignty as over the territorial sea. In principle, the scope of the historic title emerging from the continued exercise of sovereignty should not be wider in scope than the scope of the sovereignty actually exercised. If the claimant State exercised sovereignty as over internal waters, the area claimed would be internal waters, and if the sovereignty exercised was sovereignty as over the territorial sea, the area would be territorial sea. For instance if the claimant State allowed the innocent passage of foreign ships through the waters claimed, it could not acquire a historic title to these waters as internal waters, only as territorial sea." The issue of historic territorial seas is discussed by C.R. Symmons, Historic Waters in the Law of the Sea, 2008, 36-7.

[31] Blum, *supra* note 30, 52-3; G. Fitzmaurice, The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law, 30 BYIL (1950), 1-70, at 39; W. Graf Vitzthum, Maritimes Aquitorium und Anschlusszone, in: id. (ed.), Handbuch des Seerechts, 2006, 63-159, at 81 (§ 29); R.R. Churchill/A.V. Lowe, The Law of the Sea, 3rd ed., 1999, 24. The question whether the concept of historic waters is of continuing relevance in contemporary law is discussed in detail by Symmons, *supra* note 30, 283-300.

[32] L.J. Bouchez, The Regime of Bays in International Law, 1964, 218. See also UN Doc. A/CN.4/143, *supra* note 30, at 13-4; Symmons, *supra* note 30, 111-6.

[33] For a detailed and conclusive discussion see D. Pharand, The Arctic Waters and the Northwest Passage: A Final Revisit, 38 ODIL (2007), 3-69, at 9-13.

with the principle "the land dominates the sea",[34] the element of "acquiescence by foreign States" was never given at all events. Both the U.S. and the European Union (EU) have repeatedly protested against the Canadian claim since its first official announcement in 1973,[35] and, as indicated above, the U.S. reiterated its position in the 1988 Agreement of Arctic Cooperation which is still in force.

b. Straight Baselines in the Arctic

Coming then to the second possible line of argument, the Canadian claim appears to be better founded. On 10 September 1985, Canada, as a consequence of the "Polar Sea" incident, implemented national legislation providing for the establishment of a system of straight baselines around its Arctic Archipelago.[36] The respective law came into force on 1 January 1986. According to Art. 8 UNCLOS and corresponding customary international law, all waters on the landward side of the baseline of the territorial sea are internal waters in which a right of passage does usually not apply. Thus, in order to deal with the justification of the Canadian claim, the question whether the respective straight baseline system was established in conformity with international law needs to be addressed.

In this respect, it should be born in mind that straight baselines may only be drawn under special geographical circumstances. Art. 5 UNCLOS expresses this notion by stating that

> "[e]xcept where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State".

A special rule for the drawing of straight baselines is contained in Art. 7 UNCLOS. The problem with regard to the case at hand is, however, that Canada had not ratified UNCLOS at the time of its straight baseline legislation. Thus, the le-

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[34] See *North Sea Continental Shelf* (*Germany v. Denmark*; *Germany v. Netherlands*), (1969) I.C.J. Reports 3, at 51 (§ 96). It has been stated by the Permanent Court of International Justice in the *Eastern Greenland* Case that a claim to sovereignty based upon continued display of authority involves "two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority" ([1933] P.C.I.J., Ser. A/B, No. 53, 45-6). It appears to be self-evident that such exercise of authority may also be conducted by natives inhabiting the area concerned such as, e.g., the *inuit*. In contrast, the situation underlying the ICJ's *Western Sahara* advisory opinion in which the existence of a link between the native tribes of Western Sahara and Morocco was indeed at issue ([1975] I.C.J. Reports 12, at 42-3), is not comparable to the situation at hand (contra Byers, *supra* note 12, at 152).

[35] See Letter of Canadian Bureau of Legal Affairs of 17 December 1973, 12 CYIL (1974), 277-9, at 279. Some scholars have pointed to the continuous presence of the Inuit people on the Arctic Archipelago and the associated ice fields as a further source of historic title; see G. MacNeil, The Northwest Passage: Sovereign Seaway or International Strait? A Reassessment of the Legal Status, 15 DJLS (2006) 204-40, at 226-7; see also C.M. Macneill, Gaining Command and Control of the Northwest Passage: Strait Talk on Sovereignty, 34 Transp. LJ (2007), 355-89, at 377.

[36] Order of 10 September 1985, Territorial Sea Geographical Co-ordinates (Area 7), available at: <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CAN_1985_Order.pdf>.

gality of the Canadian approach has to be measured against the prerequisites of customary international law. In this regard, attention is, again, to be turned to the ICJ's judgment in the *Anglo-Norwegian Fisheries Case* in which the Court had to address the question whether Norway had respected international law when establishing a system of baselines around its coasts. The Court accepted the employment of the method of straight baselines, provided that the relevant coastline features certain geographical characteristics, by stating:

> "Where a coast is deeply indented and cut into, as is that of Eastern Finnmark, or where it is bordered by an archipelago such as the 'skjærgaard' along the western sector of the coast here in question, the base-line becomes independent of the low-water mark, and can only be determined by means of a geometrical construction."[37]

Irrespective of the fact that the Court literally invented the preconditions for the employment of straight baselines (which at the time were not incorporated in any international convention) and was, thus, criticized for its progressive reasoning,[38] the said elements were later included in the provisions of the Geneva Convention on the Territorial Sea and the Contiguous Zone of 1958 (Art. 4)[39] and UNCLOS (Art. 7).[40] Thus, the decisive question seems to be whether the Canadian Arctic Archipelago is geographically comparable to the "skjærgaard" archipelago off the Norwegian coast. This question cannot be addressed here in detail. Donat Pharand has convincingly answered it to the positive by not only referring to the labyrinth-like structure of the Arctic Archipelago which consists of 73 major and thousands of smaller islands, but also pointing to the fact that the coast of the Canadian mainland is far from constituting a clear dividing line between land and sea.[41] Additionally, the Canadian Archipelago also meets the strict test formulated by the – generally straight baseline-skeptical – U.S. in 1987,[42] under which

> "the directional trend of an offshore island grouping should not deviate more than 20° from the direction of the relevant mainland coast".[43]

Finally, as the sea to land ratio is with 0.8 to 1 considerably better than the 3.5 to 1 ratio for the Norwegian Archipelago, it cannot be doubted that Canada was entitled to draw straight baselines around its Arctic Archipelago under the prerequi-

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[37] *Fisheries* (*United Kingdom v. Norway*), (1951) I.C.J. Reports 116, at 128-9.

[38] See W.M. Reisman/G.S. Westerman, Straight Baselines in International Maritime Boundary Delimitation, 1992, 19-20.

[39] 516 U.N.T.S. 205 (No. 7477).

[40] Whether the reasoning of the Court was incorporated one-to-one as to the relationship between the normal baseline and the straight baseline (exception?) is disputed in legal writings; see Pharand, *supra* note 33, at 14.

[41] Ibid., at 15-6; contra, but unconvincing, Kraska, *supra* note 26, at 272: "Canadian straight baselines in the Arctic, both in the East and West, project at numerous points tens of miles into the high seas, violating virtually every rule governing lawfully drawn baselines."

[42] Ibid., at 19.

[43] U.S. Department of State, Limits in the Seas, No. 106, Developing Standard Guidelines for Evaluating Straight Baselines, 1987, 18. The criteria suggested in this study have, of course, not entered the body of customary international law.

sites established by the ICJ. But does this really exclude all navigation of third States unless prior Canadian authorization is given?

c. The Right of Innocent Passage through the Arctic Straits

As regards the utilization of its internal waters by ships of third States, the aforementioned position of Canada seems problematic. Art. 8 (2) UNCLOS explicitly states that

> "[w]here the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters".

It should be noted in this respect that a ship in innocent passage is generally not obliged to ask for the coastal State's authorization under international law. Admittedly, the aforementioned provision may probably not be invoked directly due to the fact that Canada acceded to the Convention only in 2003. However, the content of respective customary international law on which Canada based its reference to the method of straight baselines, may not be assessed without taking into consideration that already in 1958, an identical provision was incorporated in the Geneva Convention on the Territorial Sea and the Contiguous Zone (Art. 5 [2]). This aspect as well as the fact that prior to the 1985 drawing of baselines around the Arctic Archipelago, a right of innocent passage in favor of foreign ships was indeed recognized,[44] speaks in favor of a persisting existence of such a right in the North West Passage.[45] By acceding to UNCLOS, Canada accepted its obligation to respect the right of innocent passage under Art. 8 (2) UNCLOS. Notwithstanding the missing retroactive effect of the Convention, the opposite assumption would clearly contradict with the ratio of Art. 311 (2) UNCLOS, according to which the Convention shall not alter the rights and obligations of States Parties arising from existing agreements as long as they do not "affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention".

On the other hand, arguing in favor of a right of transit passage through the North West Passage does not seem to be reasonable. According to Arts. 34 (1), 37 UNCLOS, such a right would premise that the North West Passage were to be regarded as a strait used for international navigation.[46] In the *Corfu Channel Case*, the ICJ held as to the necessary elements for a strait to be "used for international navigation" that

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[44] Pharand, *supra* note 33, at 42.

[45] The same conclusion, based on a slightly different reasoning, is reached by Kraska, *supra* note 26, at 272; contra Pharand, *supra* note 33, at 42-3.

[46] The second element of the provisions mentioned above ("used for international navigation") is ignored by Kraska, *supra* note 26, stating that "[u]nder international law, the Northwest Passage, as well as its Eurasian counterpart, the Northeast Passage, fall within the classic definition of a strait used for international navigation" (at 275, footnote omitted).

"[i]t may be asked whether the test is to be found in the volume of traffic passing through the Strait or in its greater or lesser importance for international navigation. But in the opinion of the Court the decisive criterion is rather its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation. Nor can it be decisive that this Strait is not a necessary route between two parts of the high seas, but only an alternative passage between the Aegean and the Adriatic Seas. It has nevertheless been a useful route for international maritime traffic."[47]

Against this background, most commentators agree that a mere potential use of a strait does not suffice for the emergence of a right of free transit passage.[48] As the North West Passage has only been passed through by 62 non-Canadian ships and yachts since 1903 (most of which obtaining prior authorization),[49] it is impossible to speak of an actual use for international navigation. This, however, may change in the near future should the Arctic ice continue to melt. One of the strategically important consequences of the emergence of a right of transit passage would be that submarines which are required to surface when making use of their right of innocent passage (cf. Art. 20 UNCLOS) would then be free to dive through the North West Passage. Additionally, Canada's authority to adopt laws and regulations relating to the passage through the strait would generally be more limited as in the case of innocent passage.[50]

3. Arctic Continental Shelf Issues

a. Status of the Continental Shelf

Turning then to the exploitation of the natural resources of the Arctic sea-bed and subsoil, the regime of the continental shelf but not the one of the Exclusive Economic Zone (EEZ) is relevant. Although Art. 56 (3) UNCLOS emphasizes the unity of the two legal regimes by considering the continental shelf as an integral part of the EEZ, rights referring to the sea-bed and its subsoil are to be exercised in accordance with the provisions on the continental shelf.[51] Thus, the continental

[47] *Corfu Channel* (*United Kingdom v. Albania*), Merits, (1949) I.C.J. Reports 4, at 28.

[48] See S.N. Nandan/D.H. Anderson, Straits Used for International Navigation, 60 BYIL (1989), 159-204, at 160; D.P. O'Connell, The International Law of the Sea, Vol. I, 1982, 314; Graf Vitzthum, *supra* note 31, at 140 (§ 162).

[49] As of 1 August 2008, the Northwest Passage was used by 99 vessels; see the table in Maceill, *supra* note 35, at 385-6. Just recently, the German research vessel Polarstern completed its journey of the Northwest Passage.

[50] Cf. Arts. 21, 42 UNCLOS. See, however, Kraska, *supra* note 26, who concludes at 261 that "Canada could achieve all its most important policy goals for the passage, and particularly widespread acceptance of and compliance with Canadian regulations for enhanced safety, security, and environmental protection of the passage, by crafting those regulations through the International Maritime Organization." See also ibid., at 279-80.

[51] See R.-J. Dupuy, L'océan partagé: analyse d'une négociation, 1979, 108-9; J.-F. Pulvenis, Zone économique et plateau continental: Unité ou dualité, 11-12 RIRI (1978), 103-20; A. Proelss, Ausschließliche Wirtschaftszone (AWZ), in: Graf Vitzthum, *supra* note 31, 222-64, at 231-2 (§§ 220-1).

shelf regime constitutes a *lex specialis* as far as the exploitation of the natural resources of the sea-bed and subsoil is concerned.

The underlying concept was first expressly mentioned in the famous Truman Declaration of 1945 in which it was stated that

> "the Government of the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control".[52]

It is generally accepted today that every coastal State has a continental shelf *ipso facto* and *ab initio* (see Art. 77 [3] UNCLOS).[53] Therefore, continental shelf proclamations only refer to the expansion and limits of the maritime zone in question.

As already mentioned, the continental shelf is not part of the coastal State's territory. Rather, it is a maritime zone over which the coastal State exercises sovereign rights for the purpose of exploring and exploiting its natural resources (cf. Art. 77 [1] UNCLOS). While these rights are exclusive in the sense that no State can undertake such activities without the coastal State's consent (cf. Art. 77 [2] UNCLOS), their exercise must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States (cf. Art. 78 [2] UNCLOS). The only exception to this rule is to be seen in the coastal State's right to construct and authorize the construction and operation of drilling platforms under Arts. 60, 80 UNCLOS which, indeed, may result in an interference with navigation. But what kind of "natural resources" does the continental shelf regime take into view? According to Art. 77 (4) UNCLOS, the sovereign rights of the coastal State refer to all "mineral and other non-living resources of the sea-bed and the subsoil together with living organisms belonging to sedentary species [...]". Hence, the importance of the continental shelf question as to the Arctic oil and gas deposits is obvious.

b. Seaward Limit of the Continental Shelf

Against this background, the decisive question is whether the Arctic States may extend their continental shelves in such a way as to encompass the relevant natural resources. A definite answer cannot be given as the respective UNCLOS provision dealing with the outer limits of the continental shelf, Art. 76, belongs to the most complicated legal norms within the realm of the law of the sea. Especially, the fact that the said provision refers to a multitude of non-legal, namely geological and/or hydrographical, and difficult-to-interpret criteria renders delineation of the outer limit of the continental shelf a challenging task. As the present authors are in no

[52] Proclamation by the President Concerning the Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf of 28 September 1945, reproduced in: 40 AJIL (1946), Supplement, Section of Documents, 45-6.

[53] See *North Sea Continental Shelf* (*Germany v. Denmark*; *Germany v. Netherlands*), (1969) I.C.J. Reports 3, at 22 (§ 19).

way qualified to gather or interpret the actual data, the following assessment of the outer limits of the continental shelf will be conducted under the assumption that the data provided by Ron Macnab et al. in 2001 is essentially correct.[54]

Art. 76 (1) UNCLOS defines the continental shelf as comprising

> "the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance".

Whereas the 1958 Continental Shelf Convention contains a maximum water depth criterion which might be exceeded where the depth of the superjacent waters allows for the exploitation of the natural resources of the said areas,[55] UNCLOS aims at resolving the legal uncertainty resulting from the exploitability test by assigning any coastal State a "juridicial" continental shelf of 200 nautical miles. In addition, a coastal State may rely on the element of natural prolongation of its land territory in order to extend its continental shelf beyond the 200 miles limit. The sovereign rights over the resources of this "extended" continental shelf are, however, not as far-reaching as on the juridicial shelf since Art. 82 UNCLOS requires coastal states to pay royalties on the exploitation of non-living resources of the extended continental shelf to the International Sea-bed Authority (ISA).[56]

The first alternative (juridicial continental shelf) is of no relevance here as it would not encompass the areas claimed by the Arctic States.[57] The latter alternative is substantiated by the definition of the continental margin given in Art. 76 (3) UNCLOS. Under this provision, the continental margin

> "comprises the submerged prolongation of the land mass of the coastal State, and consists of the sea-bed and subsoil of the shelf, the slope and the rise".

But this does not answer the question where the outer edge of the continental margin is located. As one author has put it, the "natural prolongation" nature of a zone is a necessary but not a sufficient condition for its legal inclusion in the continental shelf.[58] In this respect, Art. 76 (2) UNCLOS points to the criteria of paragraphs 4 to 6.

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[54] R. Macnab/P. Neto/R. van de Pol, Cooperative Preparations for Determining the Outer Limit of the Juridicial Continental Shelf in the Arctic Ocean: A Model for Regional Collaboration in Other Parts of the World?, IBRU Boundary and Security Bulletin, Spring 2001, 86-96.

[55] See Art. 1 of the Continental Shelf Convention, 499 U.N.T.S. 312 (No. 7302).

[56] For a detailed analysis of the royalty requirement see A. Chircop/B.A. Marchand, International Royalty and Continental Shelf Limits: Emerging Issues for the Canadian Offshore, 26 Dalhousie LJ (2003), 273-302.

[57] It should be noted, though, that while the recent discussion, including this article, focuses on the extended continental shelf, the bulk of the non-living resources of the Arctic is projected to be within the juridical continental shelf; see T. Potts/C. Schofield, Current Legal Developments – The Arctic, 23 IJMCL (2008), 151-76, at 154 with further references.

[58] M. Benitah, Russia's Claim in the Arctic and the Vexing Issue of Ridges in UNCLOS, 11 ASIL Insights (2007), Issue 27.

According to these criteria, each State shall, wherever the margin extends beyond 200 miles, delineate the outer limits of its continental shelf by straight lines not exceeding 60 nautical miles in length which connect fixed points (cf. Art. 76 [7] UNCLOS) located either where the thickness of sedimentary rocks is at least 1 % of the shortest distance from such points to the foot of the continental slope (Irish Formula[59]), or at a distance of not more that 60 nautical miles from the foot of the slope (Hedberg Formula[60]). Applying the Irish Formula to the Arctic Ocean, one would end up with two larger areas outside of the foot of the slope plus 60 nautical miles line,[61] one of which being located in the Canada Basin, and the other one along the Gakkel Ridge and the Eurasian Basin. Employing the sediment thickness test of the Hedberg Formula, Macnab concludes that only a rather small sliver of sea-bed encompassing the Gakkel Ridge fails to meet the 1 % thickness requirement.[62] If one would combine both methods with the aim to achieve the largest possible yield of claimable territory, this would lead to the conclusion that, notwithstanding the cut off limits, almost the whole sea-bed underlying the Arctic Ocean, with the exception of the area along the Gakkel Ridge, would be encompassed by the sum of all relevant continental shelf claims.

[59] The Irish Formula is also known as the Gardiner rule, cf. P.R.R. Gardiner, Reasons and Methods for Fixing the Outer Limit of the Legal Continental Shelf beyond 200 Nautical Miles, 11-12 RIRI (1978), 145-77. For a discussion of the Irish continental shelf claim see: C.R. Symmons, Ireland and the Law of the Sea, *in*: T. Treves/L. Pineschi (eds.), The Law of the Sea: The European Union and Its Member States, 1997, 263-325, at 286-7.

[60] Cf. H.D. Hedberg, The National-international Jurisdictional Boundary on the Ocean Floor, 1 Ocean and Coastal Management (1973), 83-118.

[61] Macnab/Neto/van den Pol, *supra* note 54, figure 8.

[62] Ibid., Figure 9.

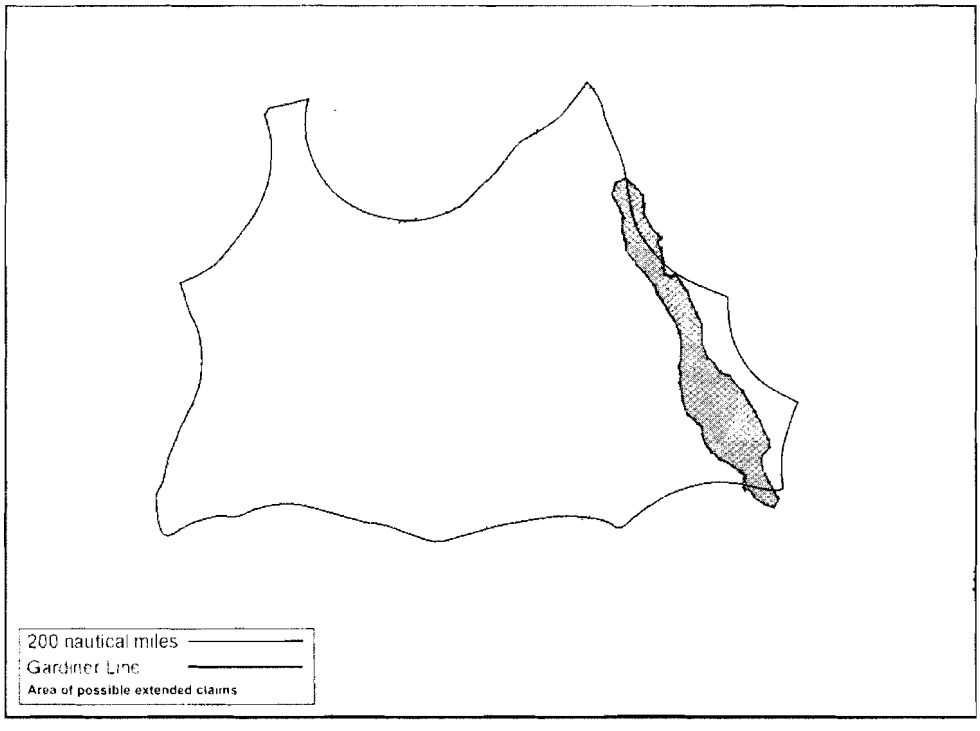

Figure 1: Area of possible continental shelf claims beyond 200 nautical miles[63]

However, as mentioned above, this does not mean that the Arctic States are legally entitled to extend their claims to the area so-described. Rather, Art. 76 (5) UNCLOS contains a maximum seaward distance rule limiting the extent of possible claims: the fixed points shall not exceed a distance of 350 nautical miles from the baselines, or they shall not exceed 100 nautical miles from the 2,500 meters isobaths (i.e., a line connecting the depth of 2,500 meters). Thus, the general assumption made in the course of recent Arctic developments that the outer limit of a coastal State's continental shelf may under no circumstances exceed 350 nautical miles[64] is not correct. The coastal State may freely choose the more favourable method in order to delineate the outer limit of its continental shelf.[65] As far as the Russian claim is concerned, applying a combination of both methods with an emphasis on the 2,500 meters isobaths rule would provide for the most beneficial results, leaving only two "donut holes" (one alongside the Gakkel Ridge and the other one in the Canada Basin).

[63] If not otherwise noted or obvious, all maps used in this article are based on maps and figures provided by Macnab/Neto/van den Pol, *supra* note 54.

[64] Benitah, *supra* note 58.

[65] Cf. R. Lagoni, Festlandsockel, in: Graf Vitzthum, *supra* note 31, 161-221, at 192 (§ 89); R.W. Smith/G. Taft, Legal Aspects of the Continental Shelf, in: P. Cook/C.M. Carleton (eds.), Continental Shelf Limits, The Scientific and Legal Interface, 2000, 17-25, at 20.

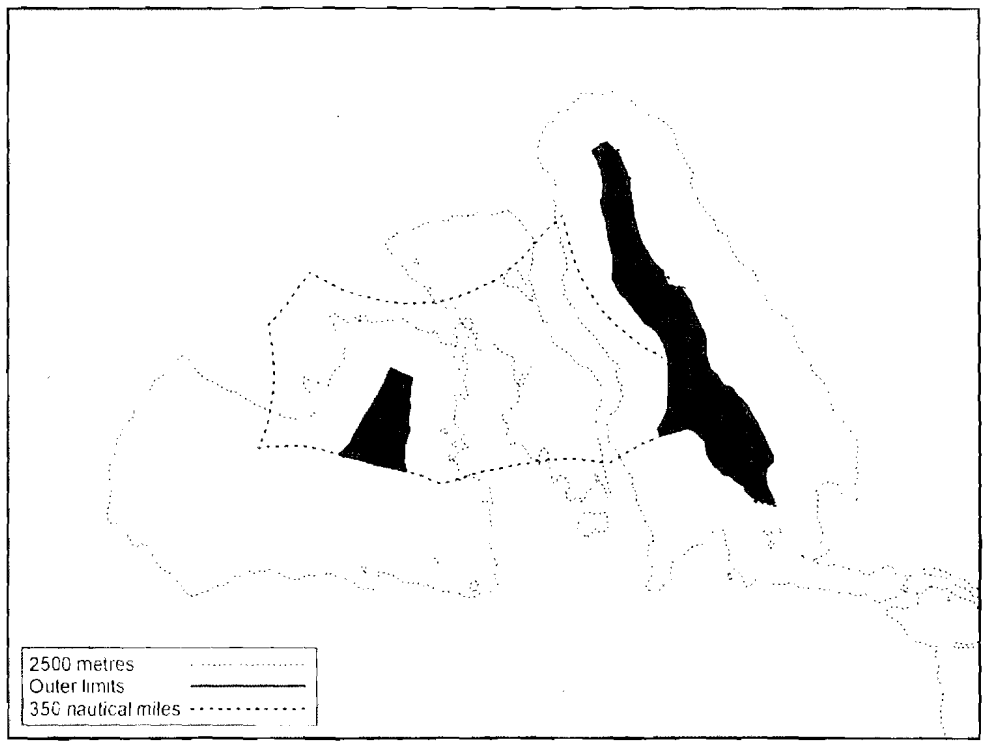

Figure 2: Two donut holes according to Macnab et al.

It is far from clear, though, whether this is the final word on continental shelf delineation in the high north, as Art. 76 (6) UNCLOS contains a *lex specialis* on the maximum seaward limit with respect to "submarine ridges". In case the continental shelf covers parts of such a ridge, its outer limits shall under no alternative exceed 350 nautical miles.[66] The ridge issue is of overwhelming importance in the Arctic Ocean as the Russian claim comprises parts of the Lomonosov and Alpha-Mendeleev Ridges. Should these structures qualify as "submarine ridges" in the aforementioned sense, they would be excluded from any possible claim beyond the 350 nautical miles cut off. Thus, the decisive question seems to be what constitutes a submarine ridge.

UNCLOS does, surprisingly enough, not contain any definition of this term. Art. 76 (2) UNCLOS only clarifies that a "submarine ridge" is not identical with an "oceanic ridge", as the latter is by definition not part of the submerged prolongation of the land mass of the coastal State, but rather forms part of the deep ocean floor. The U.S. position is that both the Lomonosov Ridge and the Alpha-Mendeleev complex constitute oceanic ridges which are not directly connected to

[66] See generally Lagoni, *supra* note 65, at 193-4 (§§ 92-3).

the Russian continental margin.[67] If this is correct, then the debate is closed since both structures would be located beyond the limits of areas under national jurisdiction. Consequently, the mineral resources of these ridges would fall within the ambit of the deep sea-bed regime; exploitation would have to be undertaken under the auspices of the ISA.

Russia, on the other hand, is anxious to prove that both ridges are directly connected to the Russian shelf and as such a natural prolongation of the Russian land territory.[68] It also tries to demonstrate that the structures are not "submarine ridges" but "submarine elevations" and, thus, natural components of its continental margin.[69] This is due to the fact that the rule on the absolute maximum seaward limit established for "submarine ridges" does in turn not apply for "submarine elevations" (cf. Art. 76 [6] UNCLOS). Art. 76 (6) UNCLOS does, again, not offer any definition of the term "submarine elevation" but only substantiates it by referring to "plateaux, rises, caps, banks and spurs". Clearly, both kinds of structures – submarine ridges as well as submarine elevations – have to be parts of the continental margin and as such genetically linked to it; if this would not be given, the underwater elevation would constitute an oceanic ridge. Against this background, it seems that the only manageable criterion is the geological continuity of the seafloor high, throughout its entire extent, with the landmass of the coastal State.[70] In this respect, to ask whether the seafloor high in question belongs to the same continental plate (then: natural component) or not (e.g., in the case of volcanic activities; then: submarine ridge) might serve as an indicator.[71] A submarine ridge would, thus, be a structure genetically and morphologically linked with the continental margin at its landward side, but which shares geological characteristics with the

[67] See United States of America: Notification Regarding the Submission Made by the Russian Federation to the Commission on the Limits of the Continental Shelf, received on 18 March 2002, Ref. No. CLCS.01.2001.LOS/USA. See also S.D. Murphy, U.S. Reaction to Russian Continental Shelf Claim, 96 AJIL (2002), 969-70; A.G. Oude Elferink/C. Johnson, Outer Limits of the Continental Shelf and "Disputed Areas": State Practice Concerning Article 76(10) of the LOS Convention, 21 IJMCL (2006), 461-87, at 470. The position of the U.S. seems to be supported by Arthur Grantz; see id., Treatment of Ridges and Borderlands Under Article 76 of the United Nations Convention of the Law of the Sea: The Example of the Arctic Ocean, in: H. Nordquist/J.N. Moore/T.H. Heidar (eds.), Legal and Scientific Aspects of Continental Shelf Limits, 2004, 201-12, at 208-9.

[68] See Receipt of the Submission Made by the Russian Federation to the Commission on the Limits of the Continental Shelf, received on 20 December 2001, Ref. No. CLCS.012001.LOS. For an executive summary, maps and other information submitted by the Russian Federation see: <http://www.un.org/depts/los/clcs_new/submissions_files/submission_rus.htm>.

[69] Ibid. See also Benitah, *supra* note 58.

[70] See H. Brekke/A. Symonds, A Scientific Overview of Ridges Related to Article 76 of the UN Convention on the Law of the Sea, in: Nordquist/Moore/Heidar, *supra* note 67, 169-99, at 187. Cf. also the statement made by Denmark in the course of the ninth UNCLOS III session, reprinted in: XIII Off. Rec. 11-24, at 17 (§ 96).

[71] Lagoni, *supra* note 65, at 193-4 (§ 94). According to the Commission on the Limits of the Continental Shelf (CLCS), this submission does not apply with regard to geological crust types.

deep sea-bed along part or all of its length in the seaward direction.[72] Whether this criterion is fulfilled in the case of the Lomonosov Ridge and Alpha-Mendeleev complex does not seem to be entirely clear. When Russia submitted relevant information on the outer limit of its continental shelf in the Arctic Ocean to the United Nations Commission on the Limits of the Continental Shelf (CLCS) in 2001, it took, as stated, the position that both underwater highs were to be considered submerged prolongations of the Russian land mass.[73] The Commission did neither accept nor reject this submission but asked, after having elaborated on alternative hypotheses on the nature and structure of the underwater highs, for more data.[74] As of today, most writers tend to the conclusion that both the Alpha and the Lomonosov Ridge constitute submarine ridges and, thus, a maximum seaward limit of 350 nautical miles applies to the most part of the Russian Continental Shelf.[75]

Working under this assumption, Macnab modified his previous assessment in 2004 by excluding the ridges beyond the 350 nautical miles cut off line, now identifying four donut holes in the Arctic.[76] This view has been adopted by Tavis Potts and Clive Schofield in 2008.[77]

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[72] Brekke/Symonds, *supra* note 70, at 187. – One author concludes that there is in fact no known example of such a structure and the whole concept of submarine ridges is moot; see G. Taft, Solving the Ridges Enigma of Article 76 of UNCLOS, available at: <http://www.gmat.unsw.edu.au/ablos/ABLOS01Folder/ TAFT.PDF>. Based on a very strict semantic interpretation of the ridges provision (while admittedly, ignoring its *travaux préparatoires*), a substantially different conclusion as to the nature of submarine ridges and natural elevations could be reached: When carefully reading Art. 76 (6) UNCLOS, one could easily come to the conclusion that in order to qualify as "natural elevation", a given formation has to be located within the "regular" continental margin. In other words, a formation only constitutes a natural elevation if it is, at least mostly, surrounded not by deep ocean floor but rather by continental margin. Thus, any ridge expanding from the continental margin to the ocean floor would necessarily be a submarine ridge; any ridge located on the continental margin, regardless of its geological origin, would have to be regarded as a natural elevation. Such an interpretation would prevent the emergence of "holes" in the continental margin which are created due to the classification of an on-lying ridge as submarine. Having said that, it would be difficult to differentiate between spurs extending from the continental margin but still qualifying as natural elevations on the one hand and submarine ridges subject to the 350 miles cut off on the other. It is also unclear what would happen to a submarine ridge extending from the outer edge of a continental margin which is already located beyond 350 nautical miles from the baselines. In the end, it seems that one has to accept that the current interpretation of Art. 76 UNCLOS, while not perfect and without criticism, is the one used by the international community and, most importantly, by the CLCS.

[73] Receipt of the Submission Made by the Russian Federation to the Commission on the Limits of the Continental Shelf, *supra* note 68. See also R. Macnab, Submarine Elevations and Ridges: Wild Cards in the Poker Game of UNCLOS Article 76, 39 ODIL (2008), 223-34, at 226-7.

[74] UN Doc. A/57/57/Add.1 of 8 October 2002, Oceans and Law of the See, Report of the Secretary General, Addendum, § 41.

[75] See, *inter alia*, R. Macnab, The Outer Limits of the Continental Shelf in the Arctic Ocean, in: Nordquist/Moore/Heidar, *supra* note 67, 301-11, at 305; Potts/Schofield, *supra* note 57, 164-5.

[76] Macnab, *supra* note 75, figure 5.

[77] Potts/Schofield, *supra* note 57, 164-5.

Figure 3: Revised outer limits by Macnab – four donut holes

The practice of formally cutting out the ridges does, however, not withstand a closer analysis. In assessing the cut off limits, Macnab heavily relied on the 2,500 meters isobaths plus 100 nautical miles rule. Indeed, especially in the centre of the Arctic Ocean (the area between the first two donut holes), one has to rely on the 2,500 meters isobaths line located along the edges of the Alpha and Lomonosov Ridges, as the 350 nautical miles cut off-line is located much closer to the coast.

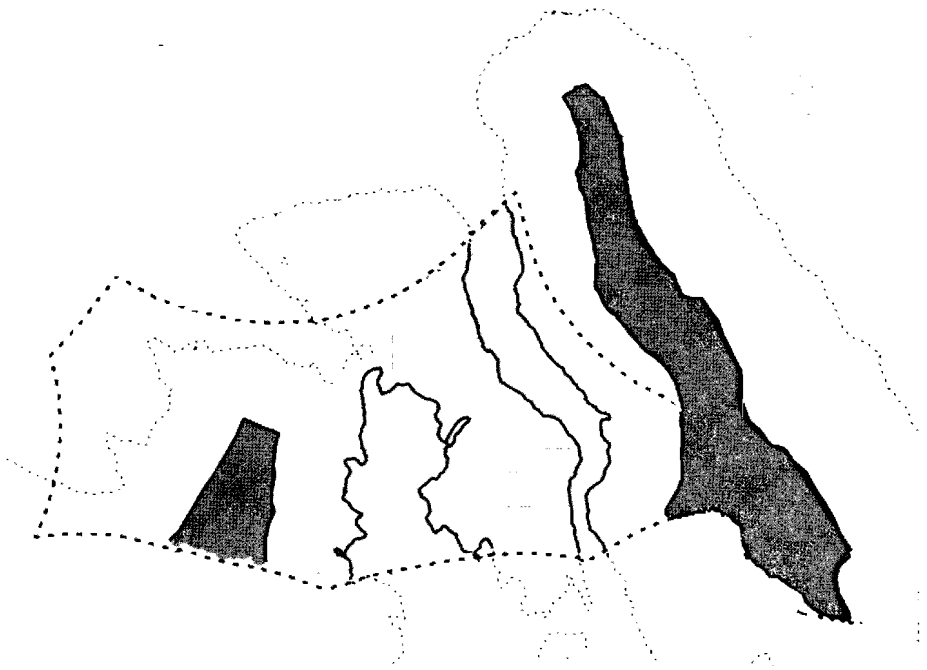

Figure 4: Questionable area between the four donut holes

Thus, the decisive issue seems to be whether a coastal state can base its claim on a 2,500 meters isobaths line established along the outer edge of a submarine ridge beyond its 350 nautical miles cut off. In this respect, Art. 76 (6) UNCLOS states that "[...] *on* submarine ridges, the outer limit shall not exceed 350 nautical miles [...]".[78] This can only mean that while the ridge itself has to be cut out, the areas surrounding it can be claimed even beyond the 350 nautical miles line, if the 2,500 meters isobaths plus 100 nautical miles requirement (taking the coastline as point of origin) is met. It does, however, not follow from this conclusion that the edge of the ridge itself can be used as the basis for establishing the 2,500 meters isobaths. This would result in every submarine ridge which clearly extends beyond the "regular" 2,500 meters isobaths line of the continental margin generating a "shadow" of continental margin of 100 nautical miles on each side.

[78] Italics added.

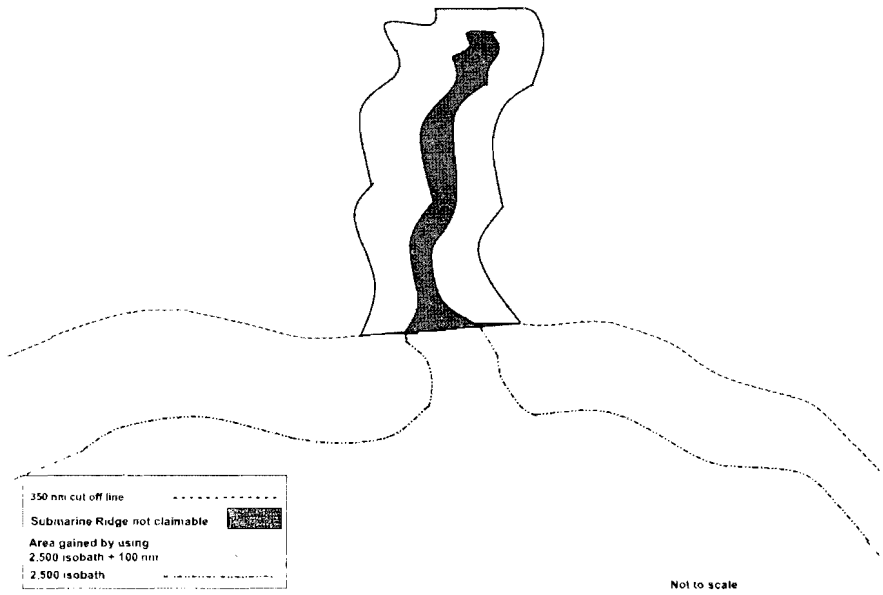

Figure 5: Illustration of shadow cast around submarine ridge

If the whole purpose of Art 76 (6) UNCLOS is to prevent States from artificially extending their continental shelves by reliance on submarine ridges, allowing them to base their extended claims on these structures in any way would clearly contradict the object and purpose of that provision. Rather than just cutting out the Lomonosov and Mendeleev Ridges beyond the 350 nautical miles line, a combined reference to the 2,500 meters isobaths plus 100 nautical miles rule and the 350 nautical miles cut off line should be adopted. Where the edge of a ridge served as the basis for drawing the 2,500 meters isobaths previously, it is the 350 nautical miles cut off line which is decisive under this revised application of Art. 76 (6) UNCLOS. This results in a significantly larger mid oceanic area not being covered by any extended continental shelf claims. Therefore, it must be concluded that contrary to what has been argued as to date, a rather large portion of the sea-bed underlying the Arctic Ocean cannot be claimed as extended continental shelf and is, as forming part of the deep ocean floor, subject to the regime of the Area under Arts. 133-191 UNCLOS (see figure 6). This area could even be larger, should the CLCS find that not only the Alpha and Lomonosov Ridges but also the Mendeleev Ridge is to be considered as a submarine ridge rather than a natural elevation.

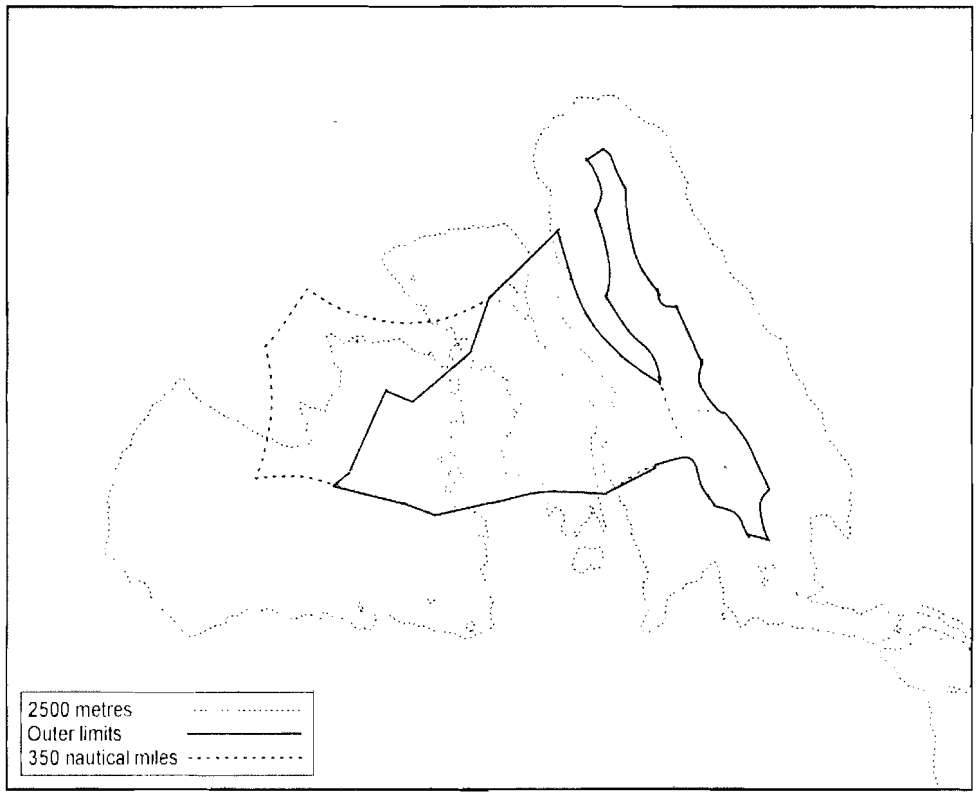

Figure 6: New evaluation of outer limits of the continental shelf in the Arctic Ocean, now not resulting in several donut holes but one consecutive area in the center. Most of the combined outer limit of Canada and Greenland consists of the 350 nautical miles cut off line while the Russian outer limit remains a combination of both.

c. The Commission on the Limits of the Continental Shelf: Responsibilities and Recommendations

What has been stated so far results in some institutional and procedural questions. Reference has already been made to the CLCS. It consists of 21 experts in the fields of geology, geophysics or hydrography and was established in order to avoid disputes over the outer shelf limits.[79] All coastal States claiming an extended continental shelf are obliged to notify the outer limits to the Commission within

[79] See Art. 2 (1) Annex II UNCLOS. On the CLCS see generally S.V. Suarez, The Outer Limits of the Continental Shelf, 2008, 75-117; P.F. Croker, The Commission on the Continental Shelf: Progress to Date and Future Challenges, in: Nordquist/Moore/Heidar, *supra* note 67, 215-21; E. Jarmache, A propos de la commission des limites du plateau continental, 11 ADM (2006), 51-68; Lagoni, *supra* note 65, at 196-7.

ten years of becoming party to UNCLOS (see Art. 4).[80] However, as the Commission had not adopted its scientific and technical guidelines before 1999,[81] the Assembly of States parties to UNCLOS decided that the ten-year-period would expire on 13 May 2009.[82] For States parties which have acceded to the Convention later than 1999 (such as, e.g., Denmark and Canada), the date of accession marks the decisive factor for the running of the period. Thus, with a view to the Arctic States, the notification period will expire in 2009 for Russia (which has acceded to UNCLOS already in 1997), in 2013 for Canada, and in 2014 for Denmark. The U.S. have not yet ratified the Convention but will likely do so until the end of 2008.[83]

After being notified, the Commission shall make recommendations – which it has so far done in respect of four submissions[84] – on matters related to the establishment of the outer limits of the continental shelf. As to the legal effects of such

[80] As of today, the CLCS has received 12 submissions, the most recent one deposited by Indonesia on 16 June 2008. The Norwegian submission of 27 November 2006 deals with, *inter alia*, the outer limit of the Norwegian Continental Shelf in the Arctic Ocean (Western Nansen Basin); see Continental Shelf Submission of Norway, Executive Summary, available at: <http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/nor_exec_sum.pdf>. The Russian reaction (available at: <http://www.un.org/ Depts/los/clcs_new/submissions_files/nor06/rus_07_00325.pdf>) only concerns the Norwegian submission in respect of the Barents Sea which is considered by Russia as an area under dispute due to overlapping claims by Russia and Norway (cf. Art. 76 [10] UNCLOS). For an overview on the first joint submission see H. Llewellyn, The Commission on the Limits of the Continental Shelf: Joint Submission by France, Ireland, Spain, and the United Kingdom, 56 ICLQ (2007), 677-94; on the process of drafting and submitting a notification see D. Monahan, An Investigation of the Feasibility of Making an Early Initial Claim to Part of Canada's Juridicial Continental Shelf Under Article 76 of UNCLOS, available at: <http://gge.unb.ca/Research/GEG/OceanGov/documents/Circulationcopy.doc>.

[81] CLCS/11 of 13 May 1999, Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf. For a deeper analysis of the technical guidelines, especially the burden of proof and hierarchy of evidence, see S. Cockburn/S.E. Nichols/D. Monahan/T. McDorman, Intertwined Uncertainties: Policy and Technology on the Juridical Continental Shelf, 2001, available at: <http://www.gmat.unsw.edu.au/ablos/ABLOS01Folder/COCKBURN.PDF>.

[82] SPLOS/72 of 29 May 2001, Decision Regarding the Date of Commencement of the Ten-year Period for Making Submissions to the Commission on the Limits of the Continental Shelf set out in Article 4 of Annex II to the United Nations Convention on the Law of the Sea.

[83] Cf. President's Statement on Advancing U.S. Interests in the World's Oceans, 46 I.L.M. (2007), 890: "I urge the Senate to act favorably on U.S. accession to the United Nations Convention on the Law of the Sea during this session of Congress." However, there is still substantial and fierce, even if somewhat emotional opposition against the treaty from Republican Senators; see, e.g., J. Inhofe, Getting Lost, The Washington Times of 30 October 2007. For background information on the U.S. position see also J.A. Duff, The United States and the Law of the Sea Convention: Sliding Back from Accession and Ratification, 24 ADMO (2006), 229-59.

[84] Submissions of Russia (2001), Australia (2004), Ireland (2005), and New Zealand (2006). Recommendations made by the CLCS are confidential in nature and, thus, aside from an executive summary, not available to the public. See CLCS/36 of 2 May 2003, Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission, § 10. For a discussion on the issue of transparency see A.A. Zinchenko, Emerging Issues in the Work of the Commission on the Limits of the Continental Shelf, in: Nordquist/Moore/Heidar, *supra* note 67, 223-46, at 226-7; R. Macnab, The Case for Transparency in the Delimitation of the Outer Continental Shelf in Accordance with UNCLOS Article 76, 35 ODIL (2004), 1-17.

recommendations, Art. 76 (8) UNCLOS states that "[t]he limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding". It does not become entirely clear whether delineations not so based must or may be regarded as valid.[85] Art. 8 Annex II UNCLOS only clarifies that "[i]n the case of disagreement by the coastal State with the recommendations of the Commission, the coastal State shall, within a reasonable time, make a revised or new submission to the Commission". As the CLCS would then be in the position to make a new recommendation which could, again, be disagreed with by the coastal State, the system envisaged by Art. 8 Annex II UNCLOS has been referred to as a "ping-pong procedure".[86]

However, neither Annex II nor Art. 76 UNCLOS address the legal consequences of a violation of a CLCS recommendation explicitly. The issue is, therefore, a matter of treaty interpretation. In this respect, the *travaux préparatoires* provide for some (even if subsidiary)[87] information as to a possible understanding of the "final and binding" formula. What seems to be particularly relevant is that an informal German proposal made in the course of the ninth session of UNCLOS III according to which "decisions" of the CLCS on the outer limit of the continental shelf were to be considered "final and binding",[88] was rejected. Similarly, early proposals made by the U.S. and the Evensen Group in 1975 used the "final and binding" clause in direct reference to the Commission's decision,[89] thereby assigning the last word in the delineation process to the CLCS. As far as can be seen, this approach was modified in the course of the eighth session by shifting the final decision-making authority from the Commission to the coastal State. The limits of the shelf were now to be established by the coastal State, even though "on the basis of" or "taking into account" the recommendations of the Commission.[90] Thus, the

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[85] P.R.R. Gardiner, The Limits of the Area beyond National Jurisdiction – Some Problems with Particular Reference to the Role of the Commission on the Limits of the Continental Shelf, in: G. Blake (ed.), Maritime Boundaries and Ocean Resources, 1987, 63-76, at 69; L.D.M. Nelson, The Continental Shelf: Interplay of Law and Science, in: N. Ando/E. McWhinney/R. Wolfrum (eds.), Liber Amicorum Judge Shigeru Oda, Vol. 2, 2002, 1235-53, at 1239; Suarez, *supra* note 79, 210-8.

[86] See Gardiner, *supra* note 85, at 69.

[87] Cf. Art. 32 Vienna Convention on the Law of Treaties (VCLT) of 23 May 1965, 1155 U.N.T.S. 331.

[88] Reproduced in: R. Platzöder (ed.), Third United Nations Conference on the Law of the Sea (1973-1982): Documents, Vol. IV, 1983, 527.

[89] Cf. M.H. Nordquist et al. (eds.), United Nations Convention on the Law of the Sea 1982, A Commentary, Vol. II, 1993, § 76.6.

[90] See, e.g., the Soviet proposal of 1979, reprinted in: Nordquist, *supra* note 89, § 76.12.; note also the Canadian position expressed in UN Doc. A/CONF.62/WS/4 of 10 April 1980, § 15: "One provision in particular, article 76, paragraph 8, which is related to the proposed commission on the limits of the continental shelf, can be regarded as eroding the sovereign rights of coastal States which have unmistakably been recognized by the basic article; article 76. The commission is primarily an instrument which will provide the international community with reassurances that coastal States will establish their continental shelf limits in strict accordance with the provisions of article 76. It has never been intended, nor should it be intended, as a means to impose on coastal States limits that differ from those already recognized in article 76. Thus to suggest that the coastal States limits shall be established

modifications introduced in the course of UNCLOS III speak in favor of a restrictive interpretation of the effects of CLCS recommendations under Art. 76 (8) UNCLOS.

Turning to the wording and context of the article concerned, one possible way of interpretation seems to be that delineation of the continental shelf is final and binding on all States parties to the Convention in case the coastal State fully implements the recommendation of the Commission.[91] Thus, in respect of the opposite situation, i.e., a violation of a CLCS recommendation, as a matter of logic, it would be impossible to regard the outer limit of the Continental Shelf so established as final and unopposable.[92] It is doubtful, though, whether that line of argument takes the particularities of maritime delineation as well as the limited mandate of the CLCS into sufficient consideration. Like every act of territorial delineation (but contrary to delimitation),[93] and irrespective of the participation of the CLCS in the delineation process, the determination of the outer limit of the continental shelf is to be qualified as a unilateral act. Admittedly, Victor Rodríguez Cedeño, Special Rapporteur of the International Law Commission (ILC), stated in his Second Report on Unilateral Acts of States that

> "[...] the unilateral acts in question are autonomous or independent of pre-existing juridical norms, for, as noted in the first report on this topic, a State can adopt unilateral acts in the exercise of a power conferred on it by a pre-existing treaty or customary norm. This appears to be the case with regard to, *inter alia*, unilateral legal acts adopted in connection with the establishment of an exclusive economic zone. Such acts, while of domestic origin, produce international effects, specifically, obligations for third States which did not participate in their elaboration. Naturally, such acts go beyond the scope of strictly unilateral acts and fall within the realm of treaty relations."[94]

With regard to the situation at hand, however, such reasoning would seem to ignore the legal difference between (unilateral) delineation and (contractual) delimi-

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'on the basis' of the commission's recommendations rather than on the basis of article 76, could be interpreted as giving the commission the function and power to determine the outer limits of the continental shelf of a coastal State."

[91] G. Eiriksson, The Case of Disagreement Between a Coastal State and the Commission on the Limits of the Continental Shelf, in: Nordquist/Moore/Heidar, *supra* note 67, 251-62, at 256.

[92] Even if this perception would be followed, this would not render the coastal State's claim null and void. Under general international law, a different view could only be advanced in case of a violation of a *ius cogens* rule. Although the legal consequences of such a breach (cf. Art. 53 VCLT) are likely to apply also in respect of unilateral acts (see UN Doc. A/CN.4/500/Add.1 of 10 May 1999, § 139), it is difficult to see how a coastal State which ignores a recommendation given by the CLCS should violate *ius cogens*. This is even more so due to the fact that Art. 76 (8) UNCLOS refrains from declaring the establishment of the outer limit of the continental shelf in violation of a recommendation by the CLCS as being null and void. See Lagoni, *supra* note 65, at 198 (§ 109).

[93] Whereas delineation comprehends the unilateral establishment of the outer limit of the continental shelf, delimitation refers to a contractual process between two or more States; see Art. 76 (7) UNCLOS on the one hand and Art. 76 (10) UNCLOS on the other.

[94] UN Doc. A/CN.4/500 of 14 April 1999, § 62.

tation.[95] The fact that Art. 76 (8) UNCLOS only awards the CLCS the mandate to give "recommendations" as to the outer limit of the continental shelf supports the unilateral character of the coastal State's claim.

Of course, this does not mean that disrespect for a recommendation of the Commission would not bear any legal consequence. On the contrary, the ICJ has stressed in its *Fisheries* judgment that

> "[t]he delimitation [sic!] of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation [sic!] is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law."[96]

Therefore, any claim in contradiction to a recommendation made by the CLCS indeed constitutes a violation of UNCLOS, namely of Art. 76 (8). However, due to the unilateral character of maritime delineation as well as the limited mandate of the CLCS, the illegality of such a claim is of a purely procedural nature. A thorough interpretation of the relevant legal rules suggests to carefully distinguish between the "procedural" level which signifies the relationship between the submitting State and the CLCS on the one hand and the substantial level of Art. 76 UNCLOS referring to the relationship between the claimant State and the community of States on the other. If this reasoning is correct, then the illegality of a claim put forward in contradiction to a CLCS recommendation does not impinge on its substantial legality but only covers the internal ("procedural") relationship between the coastal State in question and the CLCS under Art. 76 (8) UNCLOS. With a view to its competences, one author has conclusively argued that the Commission may not be considered as being the watchdog of the international community "curbing exaggerated claims by some greedy coastal States" in the following terms:

> "The Commission is not a court of law, nor has it ever expected to become one. It was neither conceived as a watchdog, nor as a chamber for the easy and convenient approval of coastal State's submissions. The role of this highly scientific organ, which is called upon to provide assistance in the very politicized realm of setting legal boundaries, is to help establish the true limit of the outer boundary of the continental shelf according to the terms of the United Nations Convention on the Law of the Sea."[97]

Indeed, if one takes the scientific and individual (non-State representative) composition of the CLCS into consideration, it is hard to imagine that States parties to the Convention were willing to confer to the Commission the competence to act as a custodian of the international community[98] on the delicate and, seen from the

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[95] Cf. UN Doc. A/CN.4/486 of 5 March 1998, First Report on Unilateral Acts of States, § 105. In this document, the two categories are combined in a rather unsystematic manner.

[96] *Fisheries* (*United Kingdom v. Norway*), (1951) I.C.J. Reports 116, at 132.

[97] Zinchenko, *supra* note 84, at 225. See also T.L. McDorman, The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World, 17 IJMCL (2002), 301-24, at 311-2.

[98] Although frequently used in legal writings and, indeed, mentioned in Art. 53 VCLT, the term "international community" is highly ambiguous; see the polemic by A. Proelss, Die internationale

general perspective, unilateral issue of maritime delineation without explicitly saying so.[99] In this respect, the silence of UNCLOS with regard to possible powers of the CLCS to submit any dispute concerning the outer limit of a coastal State's continental shelf to a court or tribunal seems to be of major significance,[100] that conclusion, as shown above, also being supported by the *travaux préparatoires*. Against this background, the only convincing way to interpret the "final and binding" clause when taking its wording, context, and drafting history into account is "that it refers only to the submitting state in that the submitting state, having delineated its outer limit of the continental shelf *and that limit not being challenged by other states*, cannot subsequently change the location of its outer limit".[101] Any other reasoning would ignore the main goal pursued with the establishment of the CLCS, that being to achieve legal certainty and legitimacy in respect of maritime delineation.[102]

Having said that, a coastal State following a recommendation which is based on an incorrect evaluation of the relevant facts by the CLCS is, as long as having acted in good faith, safe from objections by third States. As any State has the right to comment on and object with a submission made by a coastal State,[103] it is justified to conclude that third States are generally estopped from challenging the legality of maritime delineation made in conformity with a recommendation by the Commission due to its "final and binding" nature. The opposite conclusion must be drawn in case the delineation may infringe upon the rights of States with adjacent or opposite coasts (cf. Art. 76 (10) UNCLOS).

Due to the somewhat unclear consequences of a coastal State's ignorance *vis-à-vis* a recommendation made by the CLCS, the question arises whether any other State has the right to take legal action against a State which has fixed the outer limit of its continental shelf in violation of a CLCS recommendation. At first sight, challenging such delineation before a court or tribunal does not seem to be inadmissible due to the fact that under Part XV UNCLOS, States parties are under an obligation to resolve their disputes which have arisen under the Convention peacefully. However, on closer examination, the decisive issue seems to be whether there

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Gemeinschaft im Völkerrecht: Normative Realität, konkrete Utopie oder "academic research tool"?, in: J. Badura (ed.), Mondialisierungen: "Globalisierung" im Lichte transdisziplinärer Reflexionen, 2004, 233-52.

[99] McDorman, *supra* note 97, at 311; similar Cockburn/Nichols/Monahan/McDorman, *supra* note 81, at 4.

[100] Nelson, *supra* note 85, at 1239, 1250; McDorman, *supra* note 97, at 318.

[101] McDorman, *supra* note 97, at 315 (original emphasis, footnote omitted).

[102] Cf. Art. 76 (9) UNCLOS providing that "[t]he coastal State shall deposit with the Secretary-General of the United Nations charts and relevant information [...] *permanently* describing the outer limits of its continental shelf" (italics added).

[103] See also G. Taft, Applying the Law of the Sea Convention and the Role of the Scientific Community Relating to Establishing the Outer Limit of the Continental Shelf Where it Extends Beyond the 200 Mile Limit, in: M.H. Nordquist/R. Long/T.H. Heidar/J.N. Moore (eds.), Law, Science & Ocean Management, 2007, 469-76, at 471-2.

exists any dispute at all between the States concerned.[104] In this respect, the necessary legal interest of a third State party may, arguably, not be deduced from the mere breach of Art. 76 (8) UNCLOS. A State not acting "on the basis of" a recommendation delivered by the CLCS does not directly injure any other State as the opposite conclusion would ignore the unilateral character of maritime delineation. The duty of the coastal State to respect recommendations of the CLCS generally affects, as stated above, only the procedural relationship between the coastal State and the Commission. Having said that, it is clear that any State with adjacent or opposite coasts may initiate legal action against the establishment of the outer limits of a continental shelf based on an alleged infringement upon its rights or claims.[105]

While it is true that an alternative basis for challenging the determination by a coastal State of the outer limit of its continental shelf could be seen in a possible violation of the substantial rules of Art. 76 UNCLOS, any third State would have to demonstrate its standing before an international tribunal. The sole possible way to establish a *ius standi* of a third party State would seem to be to rely on the common heritage of mankind principle under Art. 136 UNCLOS as forming part of the regime of international sea-bed area, which would be affected by delineating the outer limit of the continental shelf in a manner inconsistent with Art. 76 UNCLOS.[106] This issue cannot be discussed here in detail. It should be noted, though, that even if one accepts that the common heritage principle contains an obligation *erga omnes*,[107] this does not necessarily imply that all States have legal standing to base a claim on its alleged violation.[108] On the contrary, the ICJ stated in its judgment of 18 July 1966 in the *South West Africa Cases* that

> "the argument amounts to a plea that the Court should allow the equivalent of an "actio popularis", or right resident in any member of a community to take legal action in vindication of a public interest. But although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present: nor is the Court able to regard it as imported by the "general principles of law" referred to in Article 38, paragraph 1 (c), of its Statute." [109]

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[104] Cf. E.D. Brown, The Areas Within National Jurisdiction, Vol. 1, 1984, I.4 15-6.

[105] R. Wolfrum, The Role of International Dispute Settlement Institutions in the Delimitation of the Outer Continental Shelf, in: R. Lagoni/D. Vignes (eds.), Maritime Delimitation, 2006, 19-31, at 27-8.

[106] See Wolfrum, *supra* note 105, at 27-31; Nelson, *supra* note 85, at 1251.

[107] R. Wolfrum, The Principle of the Common Heritage of Mankind, 43 ZaöRV (1983), 312-37.

[108] Contra Wolfrum, *supra* note 105, at 30: "It is not but a logical step that States may take action to protect established interests of the international community otherwise such community interests would be – legally speaking – nothing but empty shells." – The situation might be different if a State extends its continental shelf to cover an area which has already been subject to mining concessions by the ISA.

[109] *South West Africa* (*Ethiopia v. South Africa*; *Liberia v. South Africa*), Second Phase, (1966) I.C.J. Reports 6, at 47 (§ 88). Arguably, the dictum cited above was not reversed by the decision of the Court in the *Barcelona Traction Case*. On the contrary, the ICJ emphasized in § 91 of its judgment of 5 February 1970 that "on the universal level, the instruments which embody human rights do not con-

The existence of a *ius standi* on the one hand and the violation of a legal rule which aims at protecting a common value are, thus, two different sides of the coin.[110] Admittedly, Art. 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts[111] seems to deliberately depart from the dictum in the *South West Africa Cases*[112] by accepting that

> "[a]ny State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) The obligation breached is owed to the international community as a whole."

However, it should not be ignored that this provision, whose validity under customary international law is not beyond doubt, does not directly address the issue of legal standing but only focuses on entitlement to invoke State responsibility. In this respect, it is meaningful that the commentary to Art. 48 of the ILC Articles does not contain any reference to "legal standing". On the contrary, it recognizes

> "that a broader range of States may have a legal interest in invoking responsibility and ensuring compliance with the obligation in question. Indeed, in certain situations, all States may have such an interest, even though none of them is individually or specially affected by the breach. This possibility is recognized in article 48."[113]

Thus, by adopting the notion of "legal interest" (which is not tantamount to "legal standing"), the commentary implicitly refers to the judgement of the ICJ in the *Barcelona Traction Case*, which, as shown, refused to accept the idea of *actio popularis*.[114] Furthermore, with regard to the situation at hand, one needs to take into account that the relevant collective interest, i.e., the preservation of the international sea-bed area, is left to be protected by the Authority and the CLCS, neither of which has been provided with the competence to submit a dispute concerning the outer limit of a coastal State's continental shelf to a court or tribunal under Part XV UNCLOS.[115]

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fer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality" (*Barcelona Traction, Light and Power Company, Limited* [*Belgium v. Spain*], Second Phase, [1970] I.C.J. Reports 3, at 47). See also *East Timor* (*Portugal v. Australia*), (1995) I.C.J. Reports 90, at 102 (§ 29): "However, the Court considers that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things."

[110] See also M. Ragazzi, The Concept of International Obligations Erga Omnes, 1997, 212; S. Talmon, Kollektive Nichtanerkennung illegaler Staaten, 2006, 293-4; contra C. Tams, Enforcing Obligations *Erga Omnes* in International Law, 2005, 161-92, who argues in detail for accepting that all States have legal standing in disputes involving breaches of obligations *erga omnes*.

[111] See UN Doc. A/RES/56/83 of 28 January 2002, Annex.

[112] YBILC 2001 II-2, 127 (footnote 725); Wolfrum, *supra* note 105, at 30.

[113] Ibid., 116 (footnote omitted).

[114] *Supra* note 109. The ICJ referred to the legal interest criterion in § 33 of its judgement; see *Barcelona Traction, Light and Power Company, Limited* (*Belgium v. Spain*), Second Phase, (1970) I.C.J. Reports 3, at 32.

[115] Wolfrum, *supra* note 105, at 25, 28; Nelson, *supra* note 85, at 1251-2; Lagoni, *supra* note 65, at 198 (§ 108).

Thus, it seems unlikely that violations of recommendations made by the CLCS will be subject of compulsory dispute settlement procedures.[116] It is not out of the question, however, that the effect and scope of CLCS recommendations could be a matter for an advisory opinion of the ICJ in future.[117] In this respect, the General Assembly has the competence to request the Court to give an opinion under Art. 96 (1) UN Charter. While, of course, the Assembly does not constitute a world legislature,[118] it represents the entire UN membership and functions and, thus, seems to be the adequate body to monitor compliance with the common heritage principle. An alternative way of having recourse to advisory proceedings may be deduced from Art. 138 (1) of the Rules of the International Tribunal for the Law of the Sea (ITLOS).[119] According to this provision, the tribunal

> "may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion".

Thus, States intending to conclude a treaty on law of the sea issues ("related to the purposes of the Convention") may agree to submit any legal question emerging within the context of that treaty to the ITLOS. It is not entirely clear from the wording of Art. 138 (1) UNCLOS, however, whether States parties to UNCLOS could make a request for an advisory opinion through an authorized body such as, e.g., the Meeting of the States Parties,[120] as the convention itself does not seem to "specifically provide" for the possibility of requesting for an advisory opinion. In any event, it would clearly constitute a circumvention of the requirements of Art. 138 (1) UNCLOS if two or more States conclude an agreement with the single purpose to obtain an advisory opinion on the legality of another State's continental shelf delineation under UNCLOS. The mandate to expand the competence of the ITLOS under that provision only applies for legal questions arising under the "international agreement" mentioned therein, not for third agreements such as UNCLOS.

For the sake of completeness, it should be noted that non-States parties to UNCLOS are, of course, under no obligation whatsoever as to the role and competence of the CLCS in the delineation of the outer limit of the continental shelf.

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[116] Contra Eiriksson, *supra* note 91, at 258-9.

[117] As to the central element of Art. 96 (1) UN Charter ("legal question") see the ICJ's Advisory Opinion of 28 May 1948 regarding *Conditions of Admission of a State to Membership in the United Nations*, (1948) I.C.J. Reports 57, at 61-2. – The argument raised by Eiriksson, *supra* note 91, at 259-60, whereby disputes in respect of maritime delineation under Art. 76 UNCLOS could theoretically be subject of an advisory opinion of the Seabed Disputes Chamber (Art. 191 UNCLOS), is to be rejected. The question whether the establishment of the outer limit of a Continental Shelf is based on a recommendation of the CLCS or not cannot be subsumed under the definition of "activities in the area" as provided for in Art. 1 (3) UNCLOS.

[118] Cf. C. Tomuschat, Obligations Arising for States Without or Against Their Will, 241 Hag. Rec. (1993-IV), 194-374, at 330-3; B. Simma, From Bilateralism to Community Interest in International Law, 250 Hag. Rec. (1994-VI), 216-384, at 262-3.

[119] International Tribunal for the Law of the Sea, Basic Texts (2005), 2005, 15-70.

[120] In the affirmative Suarez, *supra* note 79, 231.

While at first sight, no reason exists why non-States parties to UNCLOS should be barred from submitting relevant information to the Commission if they decide to do so in their free will,[121] one must not ignore the fact that a positive answer to this question may, arguably, only be given if one accepts that the concept of the extended continental shelf in terms of Art. 76 (8) UNCLOS ("information on the limits of the Continental Shelf beyond 200 nautical miles from the baselines") has entered the body of customary international law. As the CLCS has only received twelve submissions until today, it seems impossible to speak of a sufficient clear and uniform State practice in order to accept a right under customary law to have access to the CLCS.[122] In any event, Annex II UNCLOS clarifies that the Convention itself does not confer any right to submit information on their continental shelves to the CLCS to non-States parties according to Art. 36 (1) VCLT, as Art. 4 of that Annex requires States to submit particulars of such limits to the Commission within ten years of the entry into force of this Convention for that State.[123]

According to Art. 76 (10) UNCLOS, the competence of the CLCS does not extend to the delimitation of continental shelf boundaries between States with opposite or adjacent coasts (cf. Art. 9 Annex II UNCLOS).[124] In this respect, Art. 83 UNCLOS obliges States parties to enter into negotiations on a delimitation agreement. As regards the Arctic Ocean, almost all maritime boundaries between the neighbouring States are disputed and have not yet been settled by international agreements. Just a brief look at the relevant maps and data shows that if the Lomonosov Ridge is considered either a submarine ridge or a natural elevation, it could be both a natural prolongation of the Russian as well as the Danish/Canadian continental shelf, thus providing for continued dispute between the parties as to the exact delimitation of their continental shelf claims. An exception is the continental shelf delimitation treaty concluded between Denmark and Canada in 1973.[125] However, also this agreement has not solved the territorial dispute between the two States over Hans Island which is considered to be of outstanding importance in substantiating the "natural prolongation"-criterion as to the Lomonosov Ridge. According to UNCLOS, if no agreement can be reached within a reasonable period of time, States concerned shall resort to the procedures of peace-

[121] See McDorman, *supra* note 97, who points at Doc. SPLOS/31 of 4 June 1998 (Report of the Eighth Meeting of the State Parties; available under: <http://daccessdds.un.org/doc/UNDOC/GEN/N98/161/23/PDF/N9816123.pdf?OpenElement>) in note 11. In that document, it was concluded that the question need not to be answered until the situation arose (§ 52).

[122] Zinchenko, *supra* note 84, at 239.

[123] See ibid., at 235-6.

[124] See also B. Kunoy, A New Arctic Conquest: The Arctic Outer Continental Margin, 76 NJIL (2007), 465-80, at 468. For a detailed analysis of Art. 76 (10) UNCLOS and relevant State practice see Oude Elferink/Johnson, *supra* note 67.

[125] Agreement between the Government of the Kingdom of Denmark and the Government of Canada Relating to the Delimitation of the Continental Shelf between Greenland and Canada of 17 December 1973, 1974 U.N.T.S. 152 (No. 13550).

ful settlement contained in the Convention (see Art. 83 [2] UNCLOS) which could eventually result in a compulsory decision of an international tribunal. It is to be noted, though, that this may only happen upon the request of one of the parties to the dispute (see Art. 286 UNCLOS).

d. Future Prospects

Will Russia comply with a recommendation made by the CLCS? In this respect, it is submitted that there are grounds for careful optimism. When the Commission gave its first recommendation, Russia did not react by proclaiming its Arctic continental shelf within the limits originally envisaged. Albeit all symbolism, the recent expedition rather indicates that Russia – in an attempt to get as much of the cake as possible, of course – relies on means of scientific evidence in order to strengthen its claim. That this submission may at least not be qualified as pure wishful thinking becomes manifest in the fact that irrespective of a U.S. protest,[126] the baselines which Russia has drawn with regard to its Arctic coast cannot, as Douglas Brubaker has observed in a detailed analysis, generally "be said to be inconsistent with international law".[127] Brubaker's findings justify the conclusion that Russian maritime policy does at least not seem to be geared to confront directly with the respective law of the sea criteria. This is even more likely to be the case in respect of the delineation of the outer limit of the continental shelf due to the mere existence and competence of the CLCS.[128] No State will tend to seek stigmatization for non-compliance with the recommendations of this expert body on the international plane. This, of course, is no guarantee for Russian or any other Arctic States' respect as to the prerequisites of UNCLOS or corresponding customary law, and, indeed, the shortcomings of public international law in view of its enforcement have been criticized all times. Still, one should neither underestimate the "soft power" of this consensual legal order nor the element of self-commitment which Russia has expressed by becoming a party to UNCLOS. Albeit all economic interests, any State is likely to measure its position towards its obligations deriving from the law of the sea against the alternatives – which often carry, as in the situation at hand, a considerable element of legal uncertainty in it. The commitment to peaceful and orderly settlement of any possible overlapping claims contained in the Ilulissat Declaration[129] makes it clear that as of today, all Arctic States seem to be willing to undertake marine delineation and delimitation in the high north in accordance with the law of the sea.[130] Against this background, expectations voiced

[126] J.A. Roach/R.W. Smith, Excessive Maritime Claims, 1994, 44-5.

[127] R.D. Brubaker, The Legal Status of the Russian Baselines in the Arctic, 30 ODIL (1999), 191-233, at 218.

[128] See also Kunoy, *supra* note 124, at 467.

[129] *Supra* note 7.

[130] Cf. also S. Thielbeer, Die Außenminister, die in die Kälte kommen, FAZ of 27 May 2008; Bellinger, *supra* note 25.

by one Arctic State that Germany[131] might be willing to accept the role of a mediator in the struggle for the Arctic natural resources, appear both promising and challenging.

4. Protection of the Arctic Environment

When analyzing the key elements of the legal regime of the Arctic Ocean, reference to the rules governing the protection of the Arctic environment is, finally, mandatory. In this respect, it should be noted that albeit corresponding proposals submitted by non-governmental organizations,[132] a specialized instrument modeled on the Protocol on Environmental Protection to the Antarctic Treaty of 4 October 1991[133] does not exist. Different to Antarctica, the Arctic Ocean is not a nature reserve but, as any other ocean area, open to sustainable use and development subject to the relevant rules of the law of the sea. Viewed from this perspective, authors who lament the lack of a comprehensive Arctic environmental protection regime[134] seem to ignore that fragmentation is a well-known and regular phenomenon in the field of international environmental law. Indeed, while any future exploitation of the continental shelf resources will certainly have an impact on the state of the Arctic environment, one must not ignore that the worse part of the diverse threats to the Arctic ecosystem results from global phenomena such as climate change. Similarly, the Arctic region serves as a sink for many hazardous substances which have been introduced into the marine environment elsewhere and transported by ocean currents and airflows to the high north, where their further transport is prevented by low temperatures.[135] Against this background, it seems justified to conclude that protection and preservation of the Arctic environment should essentially be addressed on the universal plane.

With regard to the law of the sea, Art. 197 UNCLOS only encourages cooperation on a regional basis

> "directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features."

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[131] See K. Watrin, Kalt und doch verlockend, Das Parlament of 19 June 2006. As to possible German interests in the Arctic see Winkelmann, *supra* note 14, at 7-8.

[132] Cf. only L. Nowlan, Arctic Legal Regime for Environmental Protection, 2001 (IUCN Environmental Policy and Law Paper), 57-66, available at: <http://www.iucn.org/themes/law/pdfdocuments/EPLP44EN.pdf>.

[133] 30 I.L.M. (1991), 1455.

[134] See, e.g., D.R. Rothwell, International Law and the Protection of the Arctic Environment, 44 ICLQ (1995), 280-312, at 298-9.

[135] O.S. Stokke, A Legal Regime for the Arctic? Interplay with the Law of the Sea Convention, 31 Marine Policy (2007), 402-8, at 404.

While this general provision does not contain any obligation for States parties to cooperate, it has been argued that stricter requirements as to the protection and preservation of the Arctic environment may be deduced from Art. 123 UNCLOS addressing cooperation of States which border enclosed or semi-enclosed seas ("shall endeavour").[136] It is not clear, however, whether the Arctic Ocean may be considered as an enclosed or semi-enclosed sea only due to the fact that the Arctic basin is surrounded by the riparian States' territories. According to Art. 122 UNCLOS, the term "enclosed or semi-enclosed sea" refers to

> "a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States".

On a closer analysis, neither of the two central criteria of that provision seems to be fulfilled in the case at hand. Statements made in the course of UNCLOS III indicate that a "narrow outlet" connecting an enclosed or semi-enclosed sea with another sea or the ocean could either be a natural strait or a manmade canal.[137] The Arctic Ocean is connected to the North Atlantic Ocean through the Norwegian Sea, located between Greenland and Norway, which may under no circumstance be considered as such a "narrow outlet". As regards the second criterion ("consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States"), it has been stated that the EEZs of the five riparian States encompass about 60 % of the surface of the Arctic Ocean.[138] Even if this estimation should hold true (which is difficult to evaluate due to the fact that the limits of the Arctic Ocean are not consistently determined),[139] it seems problematic to hold that the said dimension implies the Arctic Ocean consisting "primarily" of EEZs.[140] This negative conclusion is also supported by the *travaux préparatoires* whereby reference to the Arctic has, as far as can be seen, never been made with a view to Arts. 122-123 UNCLOS. Rather, the Arctic Ocean has been treated as a special case of its own.[141] Finally, it should not be ignored that the duty to cooperate under Art. 123 (b) UNCLOS, if applicable, would seem to contradict in parts with the unilateral approach on which the "Arctic exception"[142] laid down in Art. 234

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[136] Pharand, *supra* note 33, 53.

[137] Cf. Nordquist, *supra* note 89, Vol. III, 1995, § 122.9(c).

[138] Pharand, *supra* note 33, 53.

[139] See R.L. Friedheim, The Regime of the Arctic – Distributional or Integrative Bargaining?, 19 ODIL (1988), 493-510, at 496.

[140] Contra J.-P. Posselt, Umweltschutz in umschlossenen und halbumschlossenen Meeren, 1995, 114, stating that 50 % of the surface of the relevant sea area are sufficient.

[141] See UN Doc. A/CONF.62/SR.32 of 8 July 1974, Statement of the Representative of Greece, § 31; A/CONF.62/C.3/SR.3 of 15 July 1974, Statement of the Representative of Denmark, § 27 ("virgin" area); A/CONF.62/C.3/SR.6 of 17 July 1974, Statement of the Representative of France, § 28; A/CONF.62/C.3/SR.10 of 26 July 1974, Statement of the Representative of Kenya, § 26; A/CONF.62/C.3/SR.19 of 26 March 1975, Statement of the Representative of Denmark, § 23.

[142] L. Legault, Protecting the Marine Environment, in: J. Holmes/J. Kirton (eds.), Canada and the New Internationalism, 1988, 99-109, at 107.

UNCLOS is based. Thus, different to the Mediterranean,[143] the Baltic Sea or the Black Sea, the Arctic Ocean cannot be regarded as a closed or semi-enclosed sea,[144] and the protection of the Arctic marine environment is mainly governed by the general and rather vague provisions of Part XII UNCLOS.[145] Having said that, Art. 234 UNCLOS authorizes any coastal State

> "to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climate conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. [...]".

This provision which originated in Canada's concerns with foreign vessel traffic in its Arctic Archipelago, authorizes the coastal State to apply national pollution standards (including measures applying to the design, construction, and equipment)[146] to foreign vessels which may be stricter than existing internationally agreed requirements.[147] It should be noted, though, that the future scope of Art. 234 UNCLOS will vary depending on the factual development of the Arctic ice layer.[148]

On the regional plane, cooperation of the Arctic States becomes manifest in several species protection treaties such as the multilateral Agreement on the Preservation of Polar Bears of 15 November 1973[149] and the 1971 Agreement on Sealing and the Conservation of the Seal Stocks in the North West Atlantic concluded between Canada and Norway.[150] As regards the protection of the marine environment, the 1992 OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic,[151] though covering a significant part of the Arctic Ocean, could not be ratified by Canada, Russia and the U.S. due to its limited territorial

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[143] See *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, (1985) I.C.J. Reports 13, at 40 (§ 47).

[144] Contra Friedheim, *supra* note 139, at 493.

[145] In addition, the terms of the 1973 International Convention for the Prevention of Pollution from Ships (12 I.L.M. [1973], 1319 – MARPOL) as well as those of the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter (1046 U.N.T.S. 120 – London Dumping Convention) apply.

[146] See Pharand, *supra* note 33, at 47; Hakapää, *supra* note 16, at 74.

[147] Cf. A. Proelss, Meeresschutz im Völker- und Europarecht, 2004, 95 (footnote 121).

[148] For an overview on the debate whether Art. 234 UNCLOS comprises the coastal State's EEZ only, or whether it also includes the territorial sea, see A.E. Boyle, Marine Pollution under the Law of the Sea Convention, 79 AJIL (1985), 347-72, at 361-2; Pharand, *supra* note 33, 47-8.

[149] 12 I.L.M. (1974), 13.

[150] 870 U.N.T.S. 85. Note that the often cited Convention for the Preservation and Protection of Fur Seals and Sea Otters in the North Pacific Ocean (Fur Seal Convention) of 1911 (5 AJIL [1911], Suppl., 267) was substituted by the terms of the Interim Convention on Conservation of North Pacific Fur Seals of 1957 (314 U.N.T.S. 105), which in turn expired in 1984; see A. Proelss, Marine Mammals, in: R. Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, 4th ed., 2008, §§ 9-10.

[151] 32 I.L.M. (1993), 1069.

scope. Irrespective of the differing areas of application of the relevant treaties, however, one source persuasively concluded that the environmental impacts of increasing exploitation of natural resources in the Arctic are "well regulated, if not in fact excessively so".[152]

Specific cooperation of the Arctic States has so far mainly taken place in the form of non-binding tools. In this respect, the 1991 Arctic Environmental Protection Strategy (AEPS) is especially worth mentioning.[153] Under this soft-law instrument which has been incorporated within the non-binding framework of the Arctic Council,[154] a permanent working group scheme was established by the Arctic States,[155] the most important of the original four being the Arctic Monitoring and Assessment Programme (AMAP). If one takes into account that with a view to the applicability of the general principles of international environmental law, knowledge of adverse effects of State activities on the environment is mandatory, environmental assessment procedures, even if undertaken under soft-law instruments, are of major importance within the existing legal regime,[156] that conclusion being supported by the experiences of the States parties to the Protocol on Environmental Protection to the Antarctic Treaty (Annex I).[157] In respect of the Arctic, this is even more so due to the fact that Iceland, Russia, and the U.S. have signed but not yet ratified the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention).[158] Thus, one author has rightly stressed the main role of AMAP being "to harmonize ongoing activities, by coordination and review of National Implementation Plans in light of the AMAP Trend and Effects Programme".[159] He convincingly concluded that "the AEPS [has] strengthened environmental governance in the region in several ways" and that "[a] legally binding Arctic environmental regime would not serve to enhance any of [its] functions significantly".[160]

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[152] T. Koivurova, The Importance of International Environmental Law in the Arctic, XIV FYIL (2003), 341-51, at 344. See also Rothwell, *supra* note 134, who at 284 refers to the fact that the Arctic States identified 26 global conventions relevant to the protection of the Arctic environment.

[153] 30 I.L.M. (1991), 1624.

[154] The Arctic Council was founded in 1996. It constitutes an intergovernmental forum without own legal personality which provides a means for promoting cooperation, coordination and interaction among the eight Arctic States. Cf. O.R. Young, The Arctic Council: Making a New Era in International Relations, 1996.

[155] Stokke, *supra* note 135, at 404; Koivurova, *supra* note 152, at 342; Rothwell, *supra* note 134, at 295-8.

[156] Cf. Koivurova, *supra* note 152, at 344-9; critical towards AMAP Rothwell, *supra* note 134, at 298-301.

[157] See R. Wolfrum, Antarctica: A Case for Common Implementation of Environmental Standards, in: M.G. Kohen (ed.), Promoting Justice, Human Rights and Conflict Resolution Through International Law, Liber Amicorum Lucius Caflisch, 2007, 809-19, at 810-7.

[158] 30 I.L.M. (1991), 735.

[159] Stokke, *supra* note 135, at 405.

[160] Ibid., at 407-8.

III. Conclusion

The present analysis of the legal regime of the Arctic Ocean set out to note that increasing temperatures and rising oil prices pose diverse challenges to this unique and special region. These challenges have resulted in seemingly escalating statements by journalists and State officials. It has, however, been shown that the dispute over the control of the North West Passage as well as the struggle over the resources of the Arctic sea-bed are adequately addressed by the existing legal framework. Especially, recently voiced concerns according to which the entire Arctic Ocean would become subject to national jurisdiction on the account of the common heritage concept have turned out to be incompatible with a proper analysis of Art. 76 UNCLOS. Having said that, it is beyond doubt that future activities on the field of resource exploitation are likely to result in threats to the Arctic environment. Thus, while far from giving rise to an "ice cold war", the situation in the Arctic is a first crucial test for the functionality of relevant UNCLOS provisions.